

JUN 20 2003

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

CATHY A. CATTERSON

U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARCO ANTONIO GARCIA-
PEREGRINA, aka Mark Garcia
aka Marco Antonio Garcia,

Defendant - Appellant.

Nos. 02-10401, 02-10402

D.C. No. CR-95-00013-JMR

D.C. No. CR-01-01368-JMR

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
John M. Roll, District Judge, Presiding

Submitted June 12, 2003**
San Francisco, California

Before: T.G. NELSON and HAWKINS, Circuit Judges, and ZILLY, District
Judge.***

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

*** Honorable Thomas S. Zilly, United States District Judge for the Western District of Washington, sitting by designation.

The district court did not err in finding that Marco Antonio Garcia-Peregrina's underlying deportation could not be collaterally attacked in an action for illegal reentry after deportation. 8 U.S.C. § 1326(a), (d). The district court also correctly calculated his criminal history score. This court reviews *de novo* a collateral challenge to an underlying deportation. United States v. Ahumada-Aguilar, 295 F.3d 943, 947 (9th Cir. 2002). A district court's determination that a prior conviction counts for purposes of the criminal history score under the Sentencing Guidelines is also reviewed *de novo*. United States v. Lopez-Pastrana, 244 F.3d 1025, 1027 (9th Cir. 2001).

In a criminal proceeding for illegal reentry after deportation,

an alien may not challenge the validity of the deportation order . . . unless the alien demonstrates that—

- (1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;
- (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and
- (3) the entry of the order was fundamentally unfair.

8 U.S.C. § 1326(d).

Garcia-Peregrina was not deprived of the opportunity for judicial review and therefore cannot collaterally attack the underlying deportation. 8 U.S.C. § 1326(d)(2). Garcia-Peregrina withdrew his pending appeal from this court,

thereby waiving the right to continued judicial review. See United States v. Mendoza-Lopez, 481 U.S. 828, 840 (1987).

Additionally, Garcia-Peregrina was not deprived of judicial review through retroactive application of AEDPA § 440(d) in his deportation proceedings. The rule announced by this court one and one-half years after Garcia-Peregrina's deportation that AEDPA § 440(d) cannot apply to "deportation cases pending on the date AEDPA became law," does not authorize a collateral challenge to the underlying deportation. Magana-Pizano v. I.N.S., 200 F.3d 603, 611 (9th Cir. 1999). This court recently stated, "as Magana-Pizano announced a new rule, it does not apply retroactively on collateral review." Alvarenga-Villalobos v. Ashcroft, 271 F.3d 1169, 1171 (9th Cir. 2001).

The district court did not err in assigning one point to Garcia-Peregrina's criminal history score for a prior misdemeanor assault. U.S. SENTENCING GUIDELINES MANUAL §§ 4A1.1, 4A1.2. The offense counts because "assault is a serious crime which is normally counted under Guideline 4A1.2." United States v. Kemp, 938 F.2d 1020, 1024 n.4 (9th Cir. 1991).

AFFIRMED.